STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MICHAEL RAEDEKE,

Defendant-Appellant.

UNPUBLISHED
May 14, 2002

No. 229128
Genesee Circuit Court
LC No. 99-005112-FC

Before: Holbrook, Jr., P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b), arising out of the death of a single victim, and also first-degree home invasion, MCL 750.110a(2). He was sentenced to concurrent terms of life imprisonment without parole for each of the first-degree murder convictions and ten to twenty years' imprisonment for the first-degree home invasion conviction. He appeals as of right. We affirm in part and remand for entry of an amended judgment of sentence reflecting a single conviction and sentence for first-degree murder, supported by two different theories, and vacate the first-degree home invasion conviction.

Defendant argues that the trial court erred by refusing to instruct the jury on voluntary manslaughter. We review this issue de novo, *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996), and determine from the record if the evidence would support the conviction of defendant of a cognate lesser offense. *People v Sullivan*, 231 Mich App 510, 517; 586 NW2d 578 (1998). A voluntary manslaughter conviction requires proof of second-degree murder, along with evidence of provocation as a mitigating factor. *People v Darden*, 230 Mich App 597, 602; 585 NW2d 27 (1998). In describing voluntary manslaughter, our Supreme Court in *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991), stated:

> First, the defendant must kill in the heat of passion. Second, the passion must be caused by an adequate provocation. Finally, there cannot be a lapse of time during which a reasonable person could not control his passions. *Maher* at 219-220 [*Maher v People*, 10 Mich 212, 219-220 (1862)]. See also Perkins & Boyce, Criminal Law (3d ed), p 85.

There was no evidence in this case that would permit the jury to find defendant guilty of voluntary manslaughter. *Pouncey, supra* at 392. First, there was insufficient evidence that the

killing occurred in the "heat of passion." Instead, the evidence showed that defendant left the victim's house and returned to his home to get a baseball bat, and then went back to the victim's house to kill her because she might be able to identify him as the person who broke into her home. "If there be actions manifesting deliberation, it cannot be said, legally, that the homicide was the product of provocation which unseated reason and allowed passion free reign." *People v Younger*, 380 Mich 678, 681-682; 158 NW2d 493 (1968). Second, there was no evidence that any passion was caused by adequate provocation. Defendant may have been provoked in the sense that he was induced to kill the victim out of fear that she could identify him. However, it has long been the law in Michigan that certain conduct will not be allowed in mitigation of criminal responsible. *People v Gjidoda*, 140 Mich App 294, 298; 364 NW2d 698 (1985). Here, the alleged provocation is nothing more than a motive to kill the victim. See *Gjidoda, supra* at 298.

Furthermore, we find no basis for defendant's claim that evidence of his intoxication and mental traits could raise a jury question on the requirement of adequate provocation. There are no defenses to voluntary manslaughter beyond those available to second-degree murder. *Darden, supra* at 597. Voluntary intoxication is not a factor that may reduce murder to manslaughter. *People v Langworthy*, 416 Mich 630, 652; 331 NW2d 171 (1982). We note that while there is some authority suggesting that a diminished capacity may be considered, *Gjidoda, supra* at 298, it is now clear that diminished capacity is not a cognizable defense for either general intent or specific intent crimes. See *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001).

With regard to voluntary manslaughter specifically, the appropriate standard by which one is left to evaluate the mitigating factor of provocation is the reasonable person standard, *Pouncey, supra* at 389, i.e., "that which would cause the reasonable person to lose control." We agree with *Sullivan, supra*, that a defendant's special mental traits cannot be considered. Hence, the evidence of defendant's intoxication and personality disorder would not aid his claim of adequate provocation. Accordingly, the trial court properly denied defendant's request to instruct the jury on voluntary manslaughter.

Defendant next argues that his multiple convictions and sentences violate his double jeopardy rights. We agree. In accordance with *People v Bigelow*, 229 Mich App 218, 220-222; 581 NW2d 744 (1998), the judgment of sentence shall be corrected to reflect a single conviction and sentence for first-degree murder, supported by two different theories, premeditated murder and felony murder. Also, because first-degree home invasion served as the predicate offense for felony-murder, we vacate defendant's conviction and sentence for first-degree home invasion in order to protect defendant's rights against double jeopardy. *Id.* at 221-222; see also *People v Harding*, 443 Mich 693, 712, 735; 506 NW2d 482 (1993); *People v Robideau*, 419 Mich 458, 489, n 8; 355 NW2d 592 (1984); *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001).

Affirmed in part, vacated in part, and remanded for correction of the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder